IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

Court of Appeal Docket No. B 025920
L.A. County Superior Ct. No. C 420153

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Plaintiff-Appellant,

and

9-13-91

MARY SUE HUBBARD,

Intervenor-Plaintiff-Appellant,

-against-

GERALD ARMSTRONG,

Defendant-Respondent.

From an Order of the Court
of Appeal, Second Appellate District,
Division Three

PETITION FOR REVIEW

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PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California:

The Church of Scientology of California and Mary Sue Hubbard, appellants below, respectfully petition for review of the decision of the Court of Appeal, Second Appellate District, Division Three, filed on July 29, 1991.

ISSUES PRESENTED FOR REVIEW

1. Whether the courts below erred by creating a new rule of law, contrary to the rule previously enunciated by the Restatement and by the California and federal courts, that a person who converts private documents may assert as a defense to a conversion claim that he acted to assist himself in a contemplated private lawsuit and to protect himself against future physical harm, where there was no immediate danger of physical assault or destruction of documents, where the conversion took place secretly over a period of several months, where the documents were secured in at least two different locations, and where the converter conceded that he took the documents to assist his lawyer in other lawsuits?

2. Whether, under the same circumstances, the courts below erred in creating new justification defenses to the torts of intrusion upon privacy, abuse of confidence, and abuse of fiduciary duty?

INTRODUCTION

This petition is from an extraordinary judgment that threatens basic constitutional and common law rules governing relations between individuals, corporations and voluntary

associations. Defendant, after leaving his position as archivist of plaintiff Church, obtained numerous highly confidential Church archives, converted them to his own unauthorized use and disseminated them to others.

The trial court found that plaintiffs had established prima facie cases of conversion, breach of fiduciary duty, intrusion into privacy and breach of confidence. Rather than granting plaintiffs' prayers for injunctive relief and proceeding to assess damages, however, the trial court proceeded to transform this relatively simple conversion and intrusion upon privacy case into a heresy trial of plaintiffs' religion. The court permitted defendant to call as witnesses apostate Scientologists whose testimony had nothing to do with the dispute in issue, but rather with their own disputes with both the alleged actions and the religious beliefs, practices and doctrines of their former Church. The testimony of such witnesses was admitted, in large part, not for its truth, but rather purportedly to show the state of mind of the defendant, despite the fact that the defendant did not know many of the witnesses or of the matters about which they testified until long after he engaged in the acts of intrusion and conversion upon which the action was founded. The trial court ultimately wrote an opinion which not only denied plaintiffs the relief to which they were entitled, but attacked the Church, the religion and its Founder based upon the irrelevant, distorted and, in many instances, invented testimony of such witnesses.

The vehicle by which the trial court permitted the case to degenerate in the above-described manner was the court's adoption

of defendant's defense that he was justified in his conduct because he purportedly believed that the documents might be useful to defend himself against a lawsuit he feared plaintiff would file, and against other unspecified retaliation. This justification defense was permitted despite the defendant's own testimony that he converted and misused the documents secretly and over a period of several months, thereby negating any possible claim that his acts were in response to an imminent emergency situation.

The Court of Appeal's decision affirming the trial court's judgment eviscerates fundamental principles and policies upon which basic rules of property, fiduciary and privacy law are based. It grants broad license to disaffected employees, business associates, clerks, family members and others unilaterally to seize, convert and disclose highly confidential and private documents of any person or corporation, on the subjective belief that it will serve their personal advantage. By such means, the concept of "outlaw" would be reintroduced, thereby fostering self-help and reducing respect for and compliance with the law.

Both the procedure and the conclusions of the lower courts are wrong under universally followed legal precedent. The Court of Appeal's novel and dangerous creation of new defenses must be rejected in the strongest terms. Equally, the trial court's gratuitous wholesale condemnation of the precepts and beliefs of an entire religion must be stricken.

STATEMENT OF THE CASE

Proceedings Below

Plaintiff Church initiated this action on August 2, 1982 (App. 1).[1] The Church alleged that defendant was a former staff member who had been assigned to a special "archives project," which involved maintaining various letters, documents, artifacts and other materials in plaintiff's possession concerning L. Ron Hubbard, the Founder of the religion of Scientology. Some of the materials were to be made available to Omar Garrison, an author who had been retained to write an authorized biography of Mr. Hubbard, subject to limitations upon disclosure of information as directed by Mr. Hubbard or the plaintiff. Defendant assumed a fiduciary duty to maintain the confidentiality, privacy and physical integrity of the archives materials and of the information contained in them.

The Church further alleged that defendant worked on the project for two years, until December 1981, when defendant converted to his own use certain of the original archives materials, as well as photocopies made on Church premises with Church equipment and materials while he was still a staff member; and that defendant disseminated those materials to unauthorized individuals.

The Church sought return of the documents, including all copies, injunctive relief against further dissemination or disclosure of the materials or the information, and damages.

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[1] References to "App. ___" and "S.App.___" are to pages to Appendix and Supplemental Appendix filed in the Court of Appeal.

On November 29, 1982, Mary Sue Hubbard intervened (App. 64), alleging that she retained an ownership or possessory interest in many of the documents taken by defendant, and that numerous documents were of a highly private and personal nature relating to her or her husband, and were kept for safekeeping by the Church. She also sought injunctive relief and damages.

At the end of trial, the court entered into evidence and unsealed, over plaintiffs' objection on grounds of relevancy, hearsay, privacy and First Amendment privilege, hundreds of documents taken by Armstrong.[2] (R.T. 4555-690.) In its Statement of Decision (App. 251), the trial court found that plaintiffs established prima facie cases on their four claims, but denied any relief on the basis of defendant's justification and unclean hands defenses. The court formulated the justification defense as defendant's reasonable belief that he was threatened with harassing lawsuits and with physical danger.

Plaintiffs appealed. On December 11, 1986, pursuant to a partial settlement agreement, the trial court dismissed with prejudice respondent's cross-complaint, and ordered the return of all documents to appellants (S.App. 1). The partial settlement agreement did not settle appellants' underlying complaints for damages for intrusion upon privacy, conversion, and breach of fiduciary duty and confidence.

Meanwhile, on December 18, 1986, the Court of Appeal dismissed appellants' appeal on the ground that the judgment

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[2] Due to several appellate and collateral orders, however, the documents remained under seal until they were returned to the Church pursuant to the partial settlement agreement in this case.

appealed from was not an appealable final judgment. (S.App. 8-21.) The Court of Appeal reasoned that, under the one-final-judgment rule, there would be no appealable final judgment until judgment was rendered on respondent's cross-complaint. (The Court of Appeal was apparently unaware that respondent's cross-complaint had in fact already been dismissed, since the dismissal was not mentioned.)

Appellants therefore filed a new notice of appeal (the instant appeal) on the basis of the trial court's December 11, 1986 order fully dismissing respondent's cross-complaint. The only issues raised in the instant appeal are appellants' challenges to the trial court's denial of relief on appellants' complaints for damages. The trial court's orders of December 11, 1986 rendered moot all issues pertaining to appellants' claims for equitable relief and to the sealing of the documents in question.

On appeal, the Court of Appeal affirmed. In a brief discussion, the court held that the defense of justification was properly applied to the tort claims asserted by petitioners. In particular, the court found that the trial court's finding that Armstrong believed that he had to turn the documents over to his lawyer to protect them as evidence in some future lawsuit or to protect himself physically was supported by substantial evidence. In doing so, the court ignored uncontroverted testimony by Armstrong himself that demonstrated conclusively that Armstrong did not fear or have reasonable grounds to fear an imminent physical attack or destruction of the documents, including testimony that: (1) Armstrong converted the documents and turned

them over to his attorney over a period of several months and secretly, even denying to the Church that he had done so, thus negating the claim that he took the documents to prevent an imminent assault; (2) Armstrong gave the documents to numerous third-parties in addition to his lawyer; and (3) Armstrong gave the documents to his lawyer so the latter might use them in other litigation. The Court of Appeal held that the mere testimony by Armstrong that he feared a physical attack at some time in the future stated a defense: "More was not required." Slip op. at 21, n.6.

The Court of Appeal also conclusorily rejected the appellants' arguments that they were entitled to a new trial, because the trial court had been prejudiced by the massive hearsay evidence admitted only to show Armstrong's state of mind. This prejudice was demonstrated by the trial court's generalized negative "findings" about the Church and its Founder, based exclusively on such hearsay evidence.[3] Indeed, the Court of Appeal compounded the trial court's error by itself writing its opinion in a way which suggested that Armstrong's purported state of mind was, in fact, truth. For example, the Court of Appeal states that Armstrong "knew that persons attempting to leave [the Church] were locked up, ... [etc.]", thereby strongly suggesting

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[3] Indeed, the Church was not permitted to rebut the hearsay evidence, since the rebuttal evidence would not have been probative of Armstrong's state of mind. Thus the trial court, and indeed the Court of Appeal, were prejudiced by exposure to only one side's hearsay evidence.

the truth of such a statement.[4] This use of language parallels the improper use of language by the trial court in restating as true matters for which the only evidence concerned Armstrong's purported state of mind. In fact, there was no evidence in the record of the truth of such matters. The same point applies to the court's reference to the purported "fair game" policy. No evidence was admitted as to the truth of such a policy, yet the Court of Appeal's language is phrased as if the matter were proven. "Fair Game" was never a "policy" of the Church; the use of the term was revoked in 1969 (Ex. AAAA, R.T. 3361-93 and passim). When it was used it was used in a colloquial fashion to indicate that a person declared "suppressive" -- equivalent to a declaration of excommunication -- could not invoke the Scientology internal justice system to resolve a dispute against a Scientologist. (R.T. 4079-80.) Thus, if a Scientologist allegedly lied to, cheated, or deprived a "suppressive person" of property, the "suppressive person" could not seek redress within the Scientology justice system. Had the court permitted the Church to offer rebuttal evidence to the hearsay allegations admitted to show Armstrong's "state of mind," the Church would

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[4] It was, of course, far easier for Armstrong to "just allege" his state of mind than to prove the underlying truth of the matters. Subsequent to this trial, in a videotaped meeting with a Scientologist whom Armstrong was attempting to induce to sue the Church, Armstrong stated that it was not necessary that allegations against the Church be true; it would be sufficient to "just allege" them. See discussion in our original opening brief at p. 12, line 11; App. 294. Armstrong knew the utility of these tactics from his experience in this case: all he had to do was "allege" his "state of mind," and such allegations became the "justification" for his tortious acts. And now, this Court has joined the trial court in setting forth these "state of mind" allegations as if they were gospel truth.

have shown that its unequivocal written policy forbids the use of illegal or tortious acts against anyone, even those, such as Armstrong, who commit unlawful acts against the Church. See the offer of proof contained in the Declaration of Mark C. Rathbun, appended to the Petition for Rehearing in the Court of Appeal. It was Armstrong who resorted to extralegal self-help devices. It was the Church which attempted to use the established legal process to regain its private and valuable documents, only to be treated by the lower courts as if it were "fair game" for having acted properly.

STATEMENT OF FACTS

A. Plaintiffs' Case

1. Parties

Plaintiff Church of Scientology of California is a non-profit California religious corporation. (R.T. 507.) For eleven years, defendant was a member of the "Sea Organization," a fraternal religious order within the Scientology movement. (R.T. 508, 693.) Plaintiff Mary Sue Hubbard was the wife of L. Ron Hubbard, who was the Founder of the religion of Scientology, and the author of the scriptures of the Church. (R.T. 509.) Mr. Hubbard died on January 24, 1986.

2. Deposition Testimony of Gerald Armstrong[5]

Defendant joined the Church of Scientology in 1969 when he enrolled in an introductory Scientology course. (R.T. 692.) From 1971, he was a member of the Sea Organization and worked

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[5] Plaintiffs established all the elements of their causes of action through the deposition testimony of Gerald Armstrong, which was read into the record.

full time for Scientology until December 12, 1981, when he resigned his Church staff position and terminated his relationship with the Church. (R.T. 692, 693.)

In January 1980, he submitted a petition directed to L. Ron Hubbard, through plaintiff Church's organizational channels, asking that Mr. Hubbard approve his assignment as a Church staff member "to handle research for your biography and related projects" and to gather and preserve "R [L. Ron Hubbard] val[uable] doc[uments] and writings." (R.T. 699-701; Ex. F.) The petition was approved.

Armstrong immediately began removing more than twenty boxes of material from storage on Church property at Gilman Hot Springs. These private materials, which related to the first years of the Hubbards' marriage and to Mr. Hubbard's life dating back to the 1920's, had been packed by Mrs. Hubbard in 1959, and were stored by the Church ever since. (R.T. 703-04, 824.) Later, when Mrs. Hubbard was no longer on Scientology staff, Armstrong gathered private materials related to the Hubbards' lives during the 1960's; access to these materials had formerly been under the exclusive control of Mrs. Hubbard. (R.T. 707-10.) Finally, defendant obtained many of Mr. Hubbard's personal secretary files dating from the 1970's. (R.T. 707-08.)

Armstrong considered the materials he collected to be extremely confidential, personal and private. The materials included personal letters, diaries, self-analyses, journals, family memorabilia and financial documents. Rigorous precautions were taken to ensure their safety. (R.T. 735-38.)

In October 1980, Omar Garrison entered into a contract with

AOSH DK Publications, a Scientology publishing company, to write an authorized biography of L. Ron Hubbard, the contents being subject to the final approval of Mr. and Mrs. Hubbard. (R.T. 722-23.) The Church assigned Armstrong to assist Garrison. (R.T. 721-22.) He thereupon began providing archives materials to Garrison. Defendant knew that the confidential documents provided to Mr. Garrison were solely for purposes of preparation of the biography. (R.T. 724-25, 727-30.)[6]

After making a decision to leave the Church, but before actually departing on December 12, 1981, defendant copied as many as 10,000 pages of documents (R.T. 743, 3270), and gave half to Garrison. Armstrong also took a great deal of original material. (R.T. 745-746.)

After defendant left the Church, he became increasingly hostile toward it and Mr. Hubbard. At the end of April, 1982, defendant made contact with Michael J. Flynn, who was the primary attorney handling over a dozen lawsuits against the Church and the Hubbards, claiming hundreds of millions of dollars in damages.[7] In early May, 1982, defendant showed Flynn two of the

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[6]Similarly, Mr. Garrison considered the documents confidential and provided only for biography use. His general practice in Scientology projects was to maintain the confidentiality of documents provided him and return them when the project was completed. (R.T. 1196-97.)

[7] Flynn, who formed Flynn Associates Management Corporation ("FAMCO"), had prepared "turnkey" suits to be filed against Churches of Scientology, and through FAMCO was prepared to sell shares in the litigation he inspired against the Church. In a document entitled "Scientology -- Review and Planning," Flynn revealed his stated goal of closing down the Church of Scientology through his improper litigation scheme.

archive documents, one of which was the original of a 1953 letter from Mrs. Hubbard to Mr. Hubbard, a letter defendant himself characterized as particularly private and personal.(R.T. 756-57.)

In May, 1982, Armstrong prevailed upon Garrison to provide him archives materials, so that he could use them as "evidence" in an unnamed lawsuit he anticipated with the Church, although he had not been sued by the Church and had no idea what he might be sued for. (R.T. 760.) In fact, defendant admitted that his purpose was to acquire materials to turn over to Mr. Flynn for use in litigation by <u>others</u> against the Church and the Hubbards; this is exactly what he did between May and August, 1982. (R.T. 4579, 764-65, 771-72.)

In late May, 1982, at the Bonaventure Hotel in Los Angeles, defendant presented to Flynn thousands of pages of private and personal archives materials, both originals and copies, including private naval records and Mr. Hubbard's private diaries dating from the mid-forties.[8] (R.T. 776-78.) Several former Scientologists, now hostile to the Church, were also present and examined the materials.[9] (R.T. 769.) Armstrong told Flynn and others that the archives materials were potential evidence in Flynn's litigation against the Church and the Hubbards. (R.T. 770-71.)

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[8]These diaries were so exceptionally private that the trial court refused to allow them into evidence. (R.T. 4602-3.)

[9]Defendant also showed the private journals and other materials to third parties on other occasions. (R.T. 752-54, 795-97.)

Thereafter, Armstrong began sending Flynn archives materials in large quantities. Between June and August, he sent 3000 pages of original archives materials and 5000 pages of copies of archives materials. (R.T. 722.) He also sent about 2000 pages of original archives and 400 pages of copies to local attorneys associated with Flynn. (R.T. 773-774.) Indeed, defendant continued the process after the instant lawsuit was filed. (R.T. 779.)

Defendant acknowledged that the archives documents which he misappropriated were private, personal and confidential; that he had no authorization to use them as he had; and that he did not believe that either Mr. or Mrs. Hubbard would ever have approved of the use he made of them. (R.T. 724-32, 765.) Thus, although defendant claimed that he took the documents to defend himself against a suit, the evidence shows that there were never any suits or threats of suits except the instant suit to recover the documents taken by Armstrong.

3. **Additional Plaintiff's Evidence**

a. Letter demand was made on defendant on May 26 and 27, 1982 to return all archives, but he denied having them. (R.T. 1147, 1149; Ex. 17, 18, 19.) Defendant's own subsequent testimony showed that he indeed did possess the documents on those dates. (R.T. 756-797.)

b. Mary Sue Hubbard did not consent to defendant's acquisition and dissemination of personal materials of fifty years of her husband's and her lives. She considered his conduct an outrageous intrusion into her and her husband's private lives. (R.T. 843-44.)

B. **Defendant's Case**

Defendant's testimony--which filled nine trial days--amounted to a litany of Mr. Armstrong's regrets for his years in Scientology, and opinions he now held about how Scientology and Mr. Hubbard misled and mistreated people.

1. **Defendant's Testimony**

Sometime after he assumed his position, his superiors noticed that defendant's performance was unsatisfactory and that he appeared to be increasingly hostile to the Church and to Mr. Hubbard. On November 24, 1981, a senior staff member requested defendant to discuss these matters, and to receive a Church confessional designed to release transgressions against moral codes. (R.T. 3502.) Although defendant convinced other Church staff that there was no basis for these requests, he testified that he considered them an attack on him, and concluded that people were trying to take over the biography project and that Scientology was "nothing but an intelligence organization." (R.T. 1678-79.)

Despite defendant's hostility to the Church, he maintained his Scientology post in order to get the archives materials out of the Church and to Garrison, where defendant believed he would have access to them. (R.T. 1681, 2286.) Finally, he took thousands of pages of original archives materials which he had been unable to copy, and on December 12, 1981, left a note that he had left. (R.T. 1680.)

Defendant tried to justify taking the documents for his own use and providing them to others on the basis of his purported fear of lawsuits and other retaliation by the Church. He placed

great weight on the fact that he was the subject of a Scientology "declare," which is a document setting forth that a parishioner has been expelled from the Church because of violations of Church policy. The first "declare," which was issued in February, 1982, but of which Armstrong did not learn until late April, noted that defendant had showed hostility toward Scientology, and had not followed proper procedure in leaving his post. (R.T. 1699, Ex. PP.)

Defendant claimed that the "declare" meant that he was automatically subject to a purported Church policy (the "fair game doctrine") allowing him to be harassed. (R.T. 1705.)[10] But the only incident which he was able to raise as purported evidence of "fair game" prior to his unauthorized acquisition and delivery of the documents was a minor dispute with the Church over possession of some photographs. Although there was no physical abuse or threat in this exchange, defendant claimed that this single incident led him to fear for his present wife's safety. (R.T. 1715.) He decided to "confront" the Church, and contacted Michael Flynn a day or two later. (R.T. 1715.)[11]

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10 The meaning and existence of "fair game" was the subject of considerable disagreement, with defendant and his witnesses claiming that his version of the policy was accurate, and with rebuttal witnesses, including an expert on religion, explaining that it was a religious doctrine denying Scientology antagonists access to the internal Scientology justice system, which operates analogously to that of the role of the traditional Jewish rabbinate in resolving legal disputes between Jews. In any event, the Church demonstrated that the policy was revoked in 1969 (Ex. AAAA, R.T. 3361-93 and passim).

[11]According to both defendant's pretrial declaration and the Statement of Facts in his trial brief--adopted by the trial court--he learned of a second "declare" in late May, after the Bonaventure

The only other incident that defendant claimed demonstrated wrongful conduct against him--alleged "harassment" by the Church's private investigators who were seeking information as to the stolen archives--occurred after he had already delivered all of the documents. (R.T. 2446.)[12]

Defendant testified about a small portion of the documents that he took. At the explicit suggestion of the trial court about how to frame his defense and how to testify about the documents (R.T. 1799), defendant stated that he took each document based on his subjective belief that it would be useful in his "defense" of an unspecified lawsuit he feared the Church would file against him. Defendant admitted, however, that he knew of no present or planned lawsuit in which such matters would be raised. (R.T. 2371.)

The trial court also permitted other former Scientologists to testify about their experiences with Scientology, even where those experiences were unknown to, and unconnected with, Armstrong. The court admitted this testimony, as well as a vast range of hearsay testimony, on the theory that it was relevant to

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meetings and after seeing Garrison to acquire more documents (R.T. 2386).

[12]In any event, the evidence as to whether the investigators in fact harassed defendant is, at best, confusing. By defendant's own testimony, on one occasion, he ran up to the investigator's car and began taking their pictures (R.T. 1728); on a second, in order to prevent them from driving away, he put his leg in front of their car (R.T. 1726, 2448). As to the third occasion, defendant first testified that he ran after the investigator's car, which swerved and struck him on the elbow, but later testified that he struck the car (R.T. 2452).

establishing Armstrong's state of mind. The trial court's decision extensively and explicitly relied on the truth of such testimony although it had not been admitted for its truth.

REASONS FOR GRANTING REVIEW

The Justification Defenses Created by the Courts Below Are Without Legal or Doctrinal Support, Are Contrary to Established Law in this and Other States, and Permit Unilateral Self-Help Acts of Conversion, Intrusion Upon Privacy and Breach of Fiduciary Duty and Confidence in the Absence of an Emergency

The practical result of the Court of Appeal's new defenses is perverse in four ways: First, plaintiffs were divested of extremely private and highly valuable documents which they indisputably owned and/or were rightfully entitled to possess. Second, the new defenses granted to a fiduciary--indeed, a fiduciary occupying the most sensitive, confidential relationship to appellants--the power to assert control over extremely private and valuable documents and information solely on the basis of his subjective belief that it would serve his personal advantage. Third, the new defenses permitted a fiduciary to exercise that power unilaterally and without prior judicial review, even though there is no dispute that the fiduciary had time to resort to judicial process before infringing on plaintiffs' fundamental--indeed, constitutionally protected--personal and property rights. And, fourth, the new defenses permitted a fiduciary unilaterally to seize the private material on his belief that it is, rather than the instrumentality or fruits of actual crime, merely indirect evidence of alleged wrongdoings that might be helpful to defendant in his defense of unspecified future litigation.

In short, the trial court permitted one who occupies a

highly sensitive fiduciary position to seize extremely personal, private documents and information, under circumstances in which even an authorized law enforcement officer would not be permitted to seize even non-confidential instrumentalities of crime--that is, under circumstances in which there is indisputably no necessity for action without resort to prior judicial authorization.

The practical impact of such a new common law rule on individuals and on the operation of institutions, both commercial and non-commercial, is hard to overestimate. The facts of this case, of course, illustrate the point. The Church appointed defendant, a long-time devotee, to one of the most sensitive fiduciary positions within the Church--that is, custodian of the most private, personal archives of the religion's founder. After taking an adversarial stance against the Church, defendant appropriated a large part of those archives on his ostensible belief that they might serve as evidence in unspecified future litigation or as some kind of shield against unspecified future wrongdoing by the Church. To permit such conduct is to place the fundamental privacy and property rights of all employees at the mercy of the subjective discretion and passion of disgruntled employees.

I. The Conversion Claim

The Court of Appeal quotes from the Restatement 2d of Torts, §§ 261 and 63, language making clear that one is justified to commit a conversion only where he would be justified to commit a "harmful or offensive contact" in self-defense. Without further analysis or discussion, the Court then states that the defense

was made out sufficiently in this case.

The Court of Appeal totally ignores the clearly established law, reflected in the Restatement, in the writings of Prosser and Keeton, and in the cases, which clearly define and limit the justification of self-defense to situations only where the defendant was faced with a present and immediate danger of physical injury. The defense is inapplicable if the apprehended danger is either past or lies in the indefinite future -- even the near future. The requirement of a present and immediate assault is rooted in the most fundamental rationale of the self-defense doctrine, which is well-summarized by Prosser and Keaton:

> "The privilege of self-defense rests upon the necessity of permitting a person who is attacked to take reasonable steps to prevent harm to himself or herself, where there is no time to resort to the law." Prosser and Keeton, Torts. (5th Ed. 1984) at 124 (emphasis added).

As stated in Restatement § 261, the self-defense doctrine is a defense to conversion under the same conditions as it is a defense to assault.[13] Thus, as stated in Comment b to Section 261, the defense obtains only when there is reasonable apprehension of immediate "confinement or a harmful or offensive contact to the actor." Comment a to Section 261 refers to Sections 63-76 for further elaboration of the doctrine of self-defense. Comment g to Section 63 states, in turn, that the privilege "extends only to acts which are done for the purpose of

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[13] Thus, the Court of Appeal's statement that the self-defense cases relied upon by the appellants "are inapposite to that at bench" (slip op. at 21, n.6), is manifestly incorrect. They are directly relevant, and indeed control this case.

protecting the actor from a presently threatened aggression." (Emphasis added.) Similarly, Comment k to Section 63 states that the privilege exists "only when the other actually apparently threatens an immediate attack upon" the defendant. (Emphasis added.) Comment k further states:

> "[T]here is no privilege to disarm another who threatens a future attack upon the actor or otherwise to disable him from carrying his purpose into effect, since there is always the chance that the other may abandon his purpose, and if he does not, that the actor will have an opportunity of repelling the attack when it becomes imminent."

The courts have uniformly followed the principles stated by Prosser and the Restatement. In the early case of Acers v. United States (1986) 164 U.S. 388, 391, the Supreme Court upheld a jury charge on self-defense which instructed that the apprehended danger "could not be a past danger, or a danger of a future injury, but a present danger." This rule requiring a present and immediate danger of bodily injury has been consistently followed by the California courts.[14]

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[14] E.g., People v. Flannel (1979) 25 Cal.3d 668, 676, 160 Cal.Rptr. 84 (must be reasonable belief "of imminent peril to life or great bodily harm"); People v. Shade (1986) 185 Cal.App.3d 711, 230 Cal.Rptr. 70 (must have honest and reasonable fear of imminent danger and must have acted solely under influence of such fear): Villines v. Tomerlin (1962) 206 Cal.App.2d 448, 452, 23 Cal.Rptr. 617 (must be reasonable belief "in an impending attack . . . or immediate damage to his property"); Boyer v. Waples (1962) 206 Cal.App.2d 725, 727, 24 Cal.Rptr. 192 (act must be "necessary"); People v. Cornett (CA 4, 1949) 93 Cal.App.2d 744, 209 P.2d 647, 650 (act must be so "urgent and pressing" as to be "necessary"): People v. Fitch (1938) 28 Cal.App.2d 31, 44 (must be "immediate danger" of bodily harm). See also People v. Lucas (1958) 160 Cal.App.2d 305, 324 P.2d 933 (1958) (danger must be imminent, and a mere fear that danger will become imminent is not enough); State v. Schroeder (1918) 103 Kan. 770, 176 P.2d 659, 660 (fear of injury "at some future time" does not justify act of self-defense, even where other party made threats immediately before the act and there were prior assaults "a few days before" the act.) In what Prosser cites as an

The facts of this case, even as found by the trial court, establish at most that defendant was on notice that the Church would resort to litigation, if necessary, to effect return of the converted records, and that no threats to his safety were shown at any time, much less at the points in time pertinent to the conversion claims: in December, 1981 when he took the documents from the Church; at the various points in the Spring and Summer of 1982 when he reacquired them from Mr. Garrison's storage; and in May, 1982, when he falsely responded to the Church's demand letter. Indeed, the protracted, ongoing and SECRET nature of defendant's conversion itself definitively contradicts any claim that he took them to defend himself against a present assault at any given point in time. Certainly, he did not face incessant assailants over a period of several months. To the contrary, there is no evidence that he faced any assailants at any time during the period he converted the documents.

Moreover, even if defendant had introduced evidence showing a present and immediate assault, he introduced none to show that the means he employed were the only and necessary means of avoiding physical danger. Restatement (Second) of Torts, § 70, Comment b, states that the actor must correctly or reasonably "believe that the means which he applies are necessary to prevent the apprehended harm and not merely that they are likely to be

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"excellent" review of the law of self-defense, the rule is affirmed: "The danger must be, or appear to be, pressing and urgent. A fear of danger at some future time is not sufficient." R.M. Perkins, Self-Defense Re-Examined, 1 UCLA L. Rev. 133, 134 (1954).

effective in preventing it." (Emphasis added.) See also People v. Clark (1982) 130 Cal.App.3d 371, 377, 181 Cal.Rptr. 682, 686 (only an act "which is necessary in view of the nature of the attack" may be used in self-defense) (emphasis added). Certainly, no reasonable mind could believe that taking a party's documents secretly over a period of several months is a certain or necessary way to effectively avoid imminent physical harm at the hands of that party.[15]

The Court of Appeal seems to have invoked the Section 261 doctrine of self-defense on the basis of defendant's alleged fear of a lawsuit as well as his generalized fear of physical harm. Fear of potential litigation -- even if the fear were reasonable -- does not even remotely establish the predicate for invoking the self-defense doctrine. As the discussion above makes clear, defendant must have reasonably apprehended present and immediate bodily injury.

II. **The Intrusion Upon Privacy Claim**

As repeatedly emphasized in appellants' briefs, and as even

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[15] The Court of Appeal's lengthy quotation (slip op. at 22) of the trial court's conclusory "findings" cannot save the judgment below. The trial court made no findings that Armstrong was in immediate danger of either an assault or a lawsuit. Given the uncontroverted facts out of Armstrong's own mouth, there is no way such findings could have been made in good faith. Indeed, the trial court's statement that Armstrong believed "he had to go public" is without record support and indeed is directly contrary to the clear evidence that Armstrong acted secretly and actually DENIED to the Church doing what he in fact had done.

It is precisely the trial court's inadequate, conclusory, and unsupportable findings and conclusions which are at issue in this appeal. The Court of Appeal may not properly decide the appeal merely by quoting the trial court's findings. Even a cursory analysis of the critical facts and the actual law requires reversal.

the trial court recognized, plaintiffs alleged and proved a prima facie claim of invasion of privacy by intrusion, and not a claim of invasion of privacy by publication. The difference is critical here: the conditional privileges referred to in Rest.2d Torts, § 652G and § 594 and relied upon by the Court of Appeal are applicable to invasion of privacy by publication, not intrusion. Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245; Pearson v. Dodd (D.C. Cir. 1969) 410 F.2d 701.

The Court of Appeal's attempted distinction of Dietemann and Pearson on the grounds that those cases rejected justification defenses for non-publication torts is thus wholly circular. It is precisely because those cases distinguished between the torts of intrusion into privacy and intrusion by publication that they govern the present case. The Court of Appeal apparently did not understand that this case is an intrusion case, not a publication case.

The torts of intrusion into privacy and invasion of privacy by publication are recognized as distinct by Rest.2d §§ 652A(1), 652B and the California law. See Miller v. NBC, Co. (1986) 187 Cal.App.3d 1463, 1482; 232 Cal.Rptr. 668 (quoting Prosser, Privacy (1960) 48 Cal. Law Review 383, 389); Nicholson v. McClatchey Newspapers (1986) 177 Cal.App.3d 509, 223 Cal.Rptr. 58, 63 (citing Dietemann approvingly).

The tort of intrusion is defined as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Rest.2d § 652(B).

In the leading case applying the California common law of "intrusion" upon privacy, defendant's agents, without plaintiff's consent, made photographs and recordings of plaintiff in his den, engaged in the allegedly fraudulent practice of medicine. Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245. The court concluded that California's law of invasion of privacy includes "instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded," and the defendant's conduct constituted such an intrusion. Id. at 249. (Quoting Pearson v. Dodd (D.C. Cir. 1969) 410 F.2d 701, 704, cert. denied, 395 U.S. 947 (1969)). See also Miller v. National Broadcasting Co. (1986) 187 Cal.App.3d 1463, 232 Cal.Rptr. 668, 679; Nicholson v. McClatchy Newspapers, (1986) 177 Cal.App.3d 509, 223 Cal.Rptr. 58, 63 (citing Dietemann approvingly).

There is no question that the facts of this case, as found by the trial court, establish the elements of the tort of intrusion. The documents in question were conceded by defendant to be private and personal, and defendant's unauthorized assumption of control over such deeply private documents would unquestionably violate the expectations -- and offend the sensibilities -- of the ordinary, reasonable man. That the documents at issue -- personal letters, diaries, self-analyses, journals, family memorabilia, financial documents, documents tracing the personal growth of a religion's founder over the course of years -- are private materials hardly requires

discussion. Indeed, defendant repeatedly admitted as much. Indeed, Comment b to Section 652B states explicitly that an "intrusion upon seclusion" claim arises from unauthorized interference with "private and personal mail" and with other "personal documents."

Thus, the trial court below properly found that plaintiffs had established a prima facie case of intrusion. Thus, the trial court's factual findings explicitly stated that the documents were "private" and "confidential" (A.App. 254-255); that Armstrong, after ending his employment with the Church, took control of the documents from Garrison in order to deliver them to other parties hostile to the Church (A.App. 254); that, at the time, both defendant and Mr. Garrison knew that although the Church had authorized "certain specific purposes" for using the documents, defendant was now taking them "for other purposes to plaintiff's detriment" (A.App. 254); and that these tactics sufficed for a prima facie finding of invasion of privacy (A.App. 255).

Since publication is not an element of the tort of intrusion, the conditional defenses to the invasion of privacy by publication tort per force do not apply. That is precisely what the Dietemann and Pearson cases hold. The Court of Appeal's distinction of them is no distinction at all.

Once the tort of intrusion is recognized as being the applicable tort in this case, the law -- typified by Dietemann and explicated by the Restatement -- clearly forbids imposition of justification defenses such as those imposed here, at least short of an imminent threat to life or limb which, as we have

shown, did not exist here. See Noble v. Sears Roebuck Co. (1973) 33 Cal.App.3d 654, 109 Cal.Rptr. 269 (intrusion not justified to obtain evidence for lawsuit); McDaniel v. Atlanta Coca-Cola Bottling Co. (Ga.App. 1939) 2 S.E.2d 810, 818 (same; first American common law case on intrusion); Froelich v. Adair (Kan. 1973) 516 P.2d 993 (same); Restatement (Second) of Torts, Section 652B, Comments (b)(2) and (4) (same).

Indeed, because the bulk of intrusion cases arise in the context of invasions of privacy aimed at securing evidence or contraband or at otherwise serving the private advantage of the defendant, it is no surprise that the courts have universally rejected a justification defense that would free potential litigants -- based solely on their subjective belief -- to acquire private documents by hook or by crook. It would be utterly anomalous if the protections against infringement of such a fundamental constitutional right were made contingent on the infringing party's subjective belief as to whether or not committing a violation of the right will serve his personal interests. Such a rule would explode the core interest that the right of privacy is intended to safeguard.

The Court of Appeal's novel defense would also shatter the delicately crafted judicial mechanism for accommodating the discovery goals of private litigants and the public interest in preserving the privacy of personal documents. In Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 125 Cal.Rptr. 553, the court held that when a litigant seeks discovery of confidential information, all interested persons, including third parties, must be afforded a fair opportunity to assert their

privacy interests in the information. In such cases, courts must carefully weigh several enumerated factors in determining whether discovery should be denied or whether protective orders should issue. Id. See also Scull v. Superior Court (People) (1988) 206 Cal.App.3d 784, 790-91, 254 Cal.Rptr. 24, 27. This prophylactic scheme of prior judicial review -- with all the attendant safeguards of notice, opportunity to be heard, and adjudication constrained by judicially defined standards -- would be wholly subverted by the Court of Appeal's novel defenses.

The legal limits on government searches and seizures provide a powerful analogy. Law enforcement authorities, of course, may not intrude into legitimate areas of privacy without prior judicial authorization (in the form of a search warrant), even when they have objectively based probable cause to believe that they will find evidence of crime or fraud. It is inconceivable that in California, where constitutional privacy rights apply equally against both private parties and the state, e.g., Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, 829, 134 Cal.Rptr. 839, a private party could be licensed to intrude on private documents without prior judicial authorization, on the basis of the party's unilateral, subjective belief that the documents may contain mere indirect evidence of unspecified wrongdoing.

III. **Breach of Confidence and Fiduciary Duty Claims**

The Court of Appeal's conclusory findings that Armstrong can invoke a justification defense to these torts under the facts of this case are equally flawed. The critical point, again, is that a confidential agent or employee cannot be free to violate his

trust and duty for his own personal advantage, absent a reasonable belief that he is in immediate and imminent physical danger. See Comment to Rest.2d of Torts, § 418; Patrick v. Cochise (Arizona 1953) 259 P.2d 569 (the only court to address the issue). The Court of Appeal is the first ever to hold that a confidential agent is free to violate his trust merely upon the speculation that he may be subject to some future assault or lawsuit. Where the agent has time to seek legal protection by resorting to the police or the courts, he must do so, just as the police must seek a warrant to seize private documents, absent exigent dire circumstances.

The practical implications of the court's novel defense are as anomalous and damaging in the broad area of fiduciary and confidential relations as in the area of privacy protections. It is not hyperbolic to say that permitting confidential employees to siphon the most sensitive private documents to their employers' adversaries, based on the employees' subjective assessment that it is personally advantageous, would revolutionize the conduct of daily business operations. Such a rule is particularly absurd in cases, such as this, in which the fiduciary has ample time to resort to legal process for objective determination of whatever claim he has that his personal interests are threatened by his employer's conduct. The courts and the Restatement, recognizing the untoward policy implications of a defense as broad as that applied by the trial court, have narrowly limited the exceptions to an agent's fiduciary and confidential duty to his principal. The exceptions do not apply here.

CONCLUSION

For the reasons stated, the petition for review should be granted, and the case should be set down for plenary review.

Dated: September 9, 1991 Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Blvd., Suite 2000, Hollywood, California 90028.

On September 9, 1991, I caused to be served the foregoing document described as PETITION FOR REVIEW on interested parties in this action as below:

Gerald Armstrong
P.O. Box 751
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Gerald Armstrong
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California Court of Appeal **HAND SERVED**
2nd Appellate District
300 S. Spring Street
Los Angeles, California 90013

Los Angeles Superior Court **HAND SERVED**
111 N. Hill Street
Los Angeles CA 90012

If hand service is indicated, I caused the above-referenced paper to be served by hand, otherwise I caused such envelopes with postage thereon fully prepaid to be placed in the United States mail at Hollywood, California.

Executed on September 9, 1991, at Hollywood, California.

Helena K. Kobrin